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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. GLENN FLYNN WILSON, Defendant and Appellant.	A120725 (Contra Costa County Super. Ct. No. 5-060377-9)

On August 23, 2005, defendant Glenn Flynn Wilson (Wilson) was engaged in a verbal and physical altercation with his pregnant girlfriend outside her friend's house in the City of Richmond. Decedent Terence Lionel Martin (Martin), a stranger to both, intervened, separated Wilson from his girlfriend, and confronted Wilson. An argument ensued between Martin and Wilson. At some point Wilson drew and fired a gun, killing Martin. Wilson claims he acted in self-defense and that he did not intentionally fire the weapon. A jury convicted him of second degree murder and further found that he intentionally discharged the firearm. He argues that instructional errors tainted the verdict and precluded the jury from properly considering a lesser verdict of involuntary manslaughter based on the so-called "misdemeanor manslaughter" rule. We conclude any instructional errors were harmless and affirm the judgment.

I. BACKGROUND

Wilson was charged by information with the August 23, 2005 murder of Martin. (Pen. Code, § 187.)[1] It was alleged that in committing the offense he personally used and intentionally and personally discharged a firearm, causing great bodily injury and death. (§ 12022.53, subds. (b), (c), (d).) It was also alleged that Wilson was a minor at least 16 years old at the time of the offense, subject to trial for the offense in adult court. (Welf. & Inst. Code, § 707, subd. (d)(1).)

Trial Testimony

The case was tried to a jury. Tambra Jones testified that in August 2005, she was seven months' pregnant with Wilson's child. On August 23, she met him after school so they could go together to a prenatal appointment. They argued almost immediately about why she had not crossed the street to meet him, and argued again after Jones spoke to a man Wilson did not know. Jones, who was upset, refused to board a bus with Wilson to go to the appointment and they separated. Jones went with a friend, Krystal Thomas (Krystal),[2] to a Church's Chicken restaurant, bought food, and carried it to Krystal's nearby home, where she sat on a car in the carport. Wilson later came to Krystal's house and asked Jones for some of the chicken. When Jones refused, they argued, Wilson grabbed the chicken and pulled Jones off the car, and Jones threw her soda at him. Wilson removed his wet clothes and then approached Jones, saying he was going to "beat [her] ass." When Krystal tried to separate the two, Wilson cursed at her.

Terence Martin, a Richmond school district employee who happened to be delivering furniture in the area, pulled up in his truck and said something to the effect of, "Don't do that. She is pregnant." He got out of his truck and argued with Wilson, telling him to stop what he was doing. Wilson cursed at Martin and told him to mind his own business. As Wilson started to walk away, Jones said that Martin choked him with one hand. Wilson hit Martin's hand away and Martin let go. They continued to argue,

[1] All statutory references are to the Penal Code unless otherwise indicated.

[2] Because three of the trial witnesses shared a surname, we refer to these witnesses by their first names for purposes of clarity, not out of disrespect.

Wilson backed away, and Martin followed him. They threatened to beat each other up and Martin scoffed at Wilson's threat. Jones then lost sight of Wilson and heard a gunshot. When she turned to look, she saw Martin fall to the ground bleeding and saw Wilson running down the street.

Martin was struck by a bullet in the left front upper torso, with the bullet severing his abdominal aorta and exiting his right upper back. The physical evidence indicated that the shot was fired from a distance greater than five to seven feet.

Lonnie Bynum, a coworker who was in the truck with Martin, testified that Martin got out the truck when he saw Wilson and Jones arguing, stepped between them, and tried to get Wilson into the street. Bynum did not see Martin put his hands on Wilson. After Bynum lost sight of Martin and Wilson, he heard a gunshot, saw Martin fall to the ground, and saw Wilson run down the street.

Krystal testified that Martin got out of the truck and told Wilson not to hit Jones because she was pregnant. Wilson responded by cursing and Martin pushed Wilson in the chest. (In a pretrial statement, Krystal said Martin grabbed Wilson by the throat.) Wilson walked away and Martin walked after him. A bush obstructed Krystal's view of Martin and she turned away. Within five or 10 seconds, she heard a gunshot and she saw Martin stumble and fall.

Sharlisa Thomas (Sharlisa), Krystal's sister, testified that she saw Wilson shoot Martin from a position in the middle of the street, about eight to fourteen feet from where Martin was standing on the sidewalk. Wilson extended his arm and fired, and Martin was not doing anything at the time that could be interpreted as a threat. After the shooting, Wilson cursed, said "my baby, my baby," hit himself on the head with his palm, and shook his head.

San Saechao, a neighbor of the Thomases, heard an argument and looked out his window. He saw a school district van parked at the corner and a Black male school district employee (Martin) talking to a White male (Wilson). Wilson was halfway across the street, walking away from Martin who was on the side of the street. Wilson's face

was down and he was shaking his head. He then turned quickly and fired a shot sideways across his body without taking time to aim.

Wilson testified that as he was arguing with Jones in the carport, "this man . . . walked up. I didn't see him. I thought it was from behind me. . . . He stepped in front of me and put his hand around my throat." Martin held Wilson's throat for 20 to 30 seconds. "I remember him saying her and pointing with his other hand while he had my throat in the right hand like she's pregnant. And I'm hitting his hand like let me go. . . ." Wilson said he was "trying to back away at the same time, . . . and [Martin] finally let me go. My momentum was already moving backwards and he . . . kind of shoved me a little bit."

Wilson looked over his shoulder and saw Bynum standing "rather close. So . . . I switched my direction towards the stairs," and Martin followed him. "I felt frightened. . . . I didn't know why he would come up and even put his hands on me like that" and then pursue him as Wilson backed away. Bynum's presence also scared Wilson because "it was obvious they were kind of together. . . . [¶] . . . [¶] . . . [E]ventually, when I got towards the sidewalk, . . . he kind of stopped. And . . . I made a couple steps towards his direction to -- I was going to get my clothes. And upon doing that, he -- he turned around, [and said,] [¶] . . . [¶] . . . 'Stay your punk ass on the sidewalk.'. . . I may have said something to him . . . insulting, like 'F you' or something. But . . . he got aggravated and he said[, 'What?'] Like . . . it was going to be . . . some tension or actual physical fight. . . . [H]e kept moving towards me."

Wilson testified that he looked down and saw the handle of a gun he was carrying in his pocket. He pulled the gun out and held it in his right hand "[f]acing down towards the cement I was standing on. [¶] . . . [¶] I then . . . recall telling him . . . this has nothing to do with him. . . . [B]ut before I said that, when he saw me pull the gun out, he looked at me and laughed like what the fuck are you going to do with that. Like I'll make you eat that shit. . . . [¶] . . . [¶] . . . I told him to leave me alone numerous times. And I told him not to come any closer to me. . . . [¶] . . . [¶] . . . [A]t this time I backed up. He was kind of moving, and I had backed off."

Wilson continued: "I don't recall whether it was a whole step or half a step or anything, but I remember I saw [Martin] move quickly in my direction. And I then kind of -- I mean, I moved back and, you know, my hand -- I didn't aim it at him or anything, but my hand moved up and I pulled my hand up and upon doing that, the gun went off." Demonstrating his arm position at trial, Wilson held "his upper arm down at his side and cock[ed] it essentially 90 degrees at the elbow." He testified that he purposely let Martin see the gun in his hand, hoping Martin would turn around and leave.

Wilson's testimony on whether he intended to fire the weapon, or whether he pointed the gun at Martin was equivocal. When asked by his counsel if he pulled the trigger, Wilson testified, "Uhm, I was holding the gun very, very tight. You know, the force if I was . . . holding it by me pulling my hand up, you know, I was squeezing it tight enough. I may have -- I don't recall whether I did it on purpose or not, but I wasn't paying attention to what I was doing with the gun at the time. So I don't recall whether I did it on purpose or not, but I believe I did. [¶] . . . [¶] . . . I did pull the trigger, actually, but I don't recall whether I squeezed on purpose or whether, you know, whether the momentum made the trigger go off or I wasn't paying attention to the actual -- actual gun at that point."[3] After the gun fired, Wilson "was shocked this had happened. Not only that the gun went off, but . . . that I believed it hit Mr. Martin. [¶] . . . [¶] . . . I got scared and ran away . . . ." Wilson testified that he did not intend to kill Martin and did not intend to fire the gun. He testified on cross-examination that when the gun fired he believed he was defending himself from Martin.

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[3] He later testified, "I wasn't thinking about pulling the trigger. Whether . . . it was a reaction of me pulling the trigger purposefully or not, I don't remember about that. I wasn't thinking about it. [¶] It was the fact that it was a . . . bunch of very sudden movements that, you know, I lifted the gun and then I pulled the trigger and the gun went off." On cross-examination, Wilson testified, "I was not thinking about pulling the trigger whatsoever. [¶] . . . [¶] . . . [W]hat I mean by 'purposefully' was I don't know whether my hand squeezed the trigger on purpose or not. . . . At the time I was not thinking about it. [¶] . . . [¶] I was not very conscious of all of my reactions. I was just trying to avoid this situation." He also testified, "I didn't never say to myself that I'm going to shoot this man, ever."

Jury Instructions

The trial court instructed the jury that Wilson was charged with murder, which occurs when a person "unlawfully kills a human being with malice aforethought." (CALJIC No. 8.10.)[4] The court instructed that malice is express "when there is manifested an intention unlawfully to kill a human being" (CALJIC No. 8.11), and implied when: "1. The killing resulted from an intentional act, [¶] 2. The natural consequences of the act are dangerous to human life, and [¶] 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. [¶] When the killing is the direct result of such an act, it is not necessary to prove that the defendant intended that the act would result in the death of a human being" (CALJIC No. 8.31; see also CALJIC No. 8.11).

The court then instructed on lesser included offenses, including voluntary and involuntary manslaughter. "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict him of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime. [¶] The crime of voluntary manslaughter is lesser to that of Murder charged in Count 1. [¶] The crime of involuntary manslaughter is lesser to that of voluntary manslaughter. [¶] . . . [Y]ou have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. . . . However, the court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the defendant not guilty of the greater crime." (CALJIC No. 17.10.)

The jury was instructed on the statutory elements of manslaughter. "The crime of manslaughter is the unlawful killing of a human being without malice aforethought." (CALJIC No. 8.37.) "Every person who unlawfully kills another human being without malice aforethought but either with an intent to kill, or with conscious disregard for human life, is guilty of voluntary manslaughter . . . . [¶] There is no malice aforethought

[4] All instructions requested and given were from CALJIC, reflecting what appears to be a continuing reluctance of the bar and the bench to depart from the "tried and true" and to use the more modern CALCRIM instructions, at least in homicide cases.

if the killing occurred upon a sudden quarrel or heat of passion or in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury." (CALJIC No. 8.40.) On involuntary manslaughter, the court instructed, "Every person who unlawfully kills a human being, without malice aforethought, and without an intent to kill, and without conscious disregard for human life, is guilty of the crime of involuntary manslaughter . . . . [¶] There is no malice aforethought if the killing occurred in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury. [¶] . . . [¶] A killing is unlawful within the meaning of this instruction if it occurred in the commission of an act, ordinarily lawful, which involves a high degree of risk of death or great bodily harm, without due caution and circumspection." (CALJIC No. 8.45.)

Closing Arguments

The prosecutor urged the jury to convict Wilson of first degree murder. He argued Wilson acted with express malice, i.e., he fired the gun intending to kill Martin, and with premeditation and deliberation. He argued Wilson did not act in imperfect self-defense or heat of passion, which he explained would negate malice and made him guilty of voluntary manslaughter instead of murder. The prosecutor did not discuss involuntary manslaughter in his initial closing argument.

The defense argued that the events of August 23, 2005, were "a perfect storm of tragic coincidence." He discussed the mens rea of murder and the lesser included offenses. He described malice, then explained that for voluntary manslaughter the killing may be intentional but the crime is mitigated because the defendant acted in heat of passion or imperfect self-defense. "Now, involuntary manslaughter on the other hand is the unintentional killing of another accompanied by reckless conduct that is not excused." Defense counsel read to the jury the standard CALJIC jury instruction on involuntary manslaughter (CALJIC No. 8.45), which included involuntary manslaughter based on commission of both a misdemeanor and an ordinarily lawful act with criminal

negligence, but he did not identify specific misdemeanors or ordinarily lawful acts to guide the jury in its application of the theories.[5]

Defense counsel argued Wilson had an imminent fear of death or great bodily harm after Martin choked him, threatened him, and said he would make Wilson "eat that shit," referring to the gun Wilson had displayed. He also argued that in these circumstances Wilson's judgment was clouded by passion triggered by sudden quarrel, emphasizing that the whole incident took place in a few minutes or even less than a minute. He argued that the shooting was not intentional. Wilson "had that gun in his hand and the gun was shaking and he gripped that gun tightly and when he thought what was an aggressive motion, he reacted and the gun went off." He asked the jury to consider, "Was Glenn Wilson trying to kill somebody when a single shot was fired and he stood there in the street afterwards shaking his head? . . . [¶] Had he really wanted to kill the man, . . . he could have fired the gun a few more times or he might have raise[d] the level up a little bit. . . . [I]t was a single shot and that gun had more bullets in it. . . . Was it pulled intentionally? That's a big and important question for each and every one of you folks." Defense counsel concluded, "Glenn Wilson is not guilty of murder. Glenn Wilson is not guilty of voluntary manslaughter unless he intended to kill this man or did a deliberate act that killed with a conscious indifference to human life. He is not guilty of involuntary manslaughter unless he was acting unlawfully when that gun discharged and was not acting in self-defense."

In rebuttal, the prosecutor told the jury, "I didn't talk about involuntary manslaughter [in my initial closing argument] because I didn't think [defense counsel] was going to, but he did. Although it was kind of interesting to me that as he is talking about it, there is [*sic*] blanks that are on his page. And he didn't give you any theory [about it], did he? [¶] . . . [S]ince he mentions it I'm going to give it about the 30 seconds that it's worth. Involuntary manslaughter is an act ordinarily lawful that's committed

[5] As discussed *post*, this was not the form in which this instruction was actually given to the jury by the court.

without due caution and circumspection. Okay. It's an act ordinarily lawful basically with criminal negligence. So, [defense counsel], . . . why don't you tell us what act that's ordinarily lawful it is that your client was in the process of committing that approximately [*sic*] resulted in the death of Terence Martin? If there isn't one, involuntary manslaughter doesn't apply. [¶] [Defense counsel] didn't go there. He left you with a piece of paper that had blanks on it and left it at that basically to leave you to your own devices."

Jury Verdict and Sentencing

During deliberations, the jury asked for "clarification of the term 'intentional act' pertaining to malice as defined in section 8-11 [*sic*]." The court asked the jury to be more specific, and the jury responded, "Is pulling out a gun and firing it an intentional act?" The court responded, "Either of those actions, if you find them proved, could qualify as an 'intentional act.' " The jury also asked for a read-back of "testimony of the events right before the gun shot was fired" from Sharlisa Thomas, San Saechao, and Wilson.

The jury returned a verdict of second degree murder and true findings on the allegations that he personally used and personally and intentionally discharged a firearm, causing Martin's death.

Wilson asked the court to modify the verdict to voluntary manslaughter pursuant to section 1181, subd. (6). He also moved for a new trial on the ground that the court should have instructed the jury, in response to their inquiry about whether pulling out or firing the gun was an intentional act, that it had to unanimously agree on which event was the intentional act that supported the second degree murder conviction. The court denied the motion. The court sentenced Wilson to imprisonment for a term of 40 years to life.

II. DISCUSSION

Wilson argues the trial court made several instructional errors that require reversal of his convictions. He contends that the trial court erred in: 1) failing to instruct on a "misdemeanor manslaughter" theory of involuntary manslaughter; 2) improperly including imperfect self-defense within the involuntary manslaughter instruction; and 3) instructing that involuntary manslaughter was a lesser included offense to voluntary

manslaughter. Although we agree the trial court erred in certain aspects of the instructions, we conclude there was no prejudice and will therefore affirm the judgment.

A. Law of Homicide

In order to provide context for Wilson's legal arguments, we first review the law of homicide, and specifically the distinctions between first and second degree murder and voluntary and involuntary manslaughter.

"Murder is the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a); *People v. Rios* (2000) 23 Cal.4th 450, 460 (*Rios*).) Malice exists if the homicide was committed with an intent to kill or with a conscious disregard for danger to human life. (*Rios*, at p. 460.) First degree murder is a killing that is premeditated and deliberate, that occurs during the commission of certain enumerated felonies (statutory felony murder), or that occurs under other specified circumstances not relevant here, where malice is not negated by heat of passion or imperfect self-defense. (§ 189; *Rios*, at p. 465.) Second degree murder is any other killing committed with an intent to kill or conscious disregard for danger to human life where malice is not negated by heat of passion or imperfect self-defense, or a killing that occurs in the commission of a felony that is not enumerated in section 189, but that is inherently dangerous to human life and does not merge with the homicide—the latter being what is generally referred to as the second degree felony-murder rule. (§ 189; *People v. Chun* (2009) 45 Cal.4th 1172, 1182, 1188–1189 (*Chun*); see *Chun*, at p. 1200 [all assaultive crimes merge with the homicide and cannot serve as the basis of felony-murder instructions].)

"Manslaughter is the unlawful killing of a human being without malice." (§ 192.) Voluntary manslaughter includes an unlawful killing committed with an intent to kill or with conscious disregard for danger to human life, where the element of malice is negated by heat of passion or imperfect self-defense. (*Rios, supra*, 23 Cal.4th at p. 461.) Heat of passion and imperfect self-defense are not elements of voluntary manslaughter that must be proved beyond a reasonable doubt to support a conviction of this form of voluntary manslaughter. (*Id.* at p. 469–470.) Rather, if "the People's own evidence suggests that the killing may have been provoked or in honest response to perceived

danger," or the defendant "proffer[s] some showing on these issues sufficient to raise reasonable doubt of his guilt of murder . . . . [¶] . . . [T]he *People* must prove *beyond a reasonable doubt* that these circumstances were *lacking* in order to establish the murder element of malice." (*Id.* at pp. 461–462, citations omitted.) Voluntary manslaughter also includes the unlawful killing of a human being without an intent to kill or conscious disregard for danger to human life in the commission of a felony not enumerated in section 189 that is inherently dangerous to human life but which merges with the homicide. (*People v. Garcia* (2008) 162 Cal.App.4th 18, 28–29, 32 & fns. 3, 4 (*Garcia*).)

As noted, imperfect self-defense can negate the element of malice in a homicide. Thus, a person who kills intentionally or with conscious disregard for danger to human life, but with an actual but unreasonable belief in the need to defend himself, is guilty of voluntary manslaughter rather than murder. (*People v. Blakeley* (2000) 23 Cal.4th 82, 91.)

The Misdemeanor Manslaughter Rule

Involuntary manslaughter is defined by statute as "the unlawful killing of a human being without malice . . . [¶] . . . [¶] . . . in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection," excepting acts committed in the driving of a vehicle. (§ 192, subd. (b).) "The term 'unlawful act, not amounting to felony' as used in section 192(b) codifies the traditional common law form of involuntary manslaughter as the predicate for finding that a homicide committed without malice was involuntary manslaughter. [Citation.]" (*People v. Cox* (2000) 23 Cal.4th 665, 671 (*Cox*).) This first clause, which is often referred to as the misdemeanor manslaughter rule, applies only if the underlying misdemeanor committed is dangerous to human life or safety, not in the abstract, but under the circumstances of its commission and is committed with criminal intent or criminal negligence. (*Id.*, at p. 675.) Under the second clause, "without due caution and circumspection" has been construed to require criminal negligence. (*People v. Penny* (1955) 44 Cal.2d 861, 879 (*Penny*).) Other theories of involuntary manslaughter not directly supported by the

statute have also been recognized. A killing without malice in the commission of a felony not enumerated in section 189 and not inherently dangerous to human life also may be involuntary manslaughter. (*People v. Burroughs* (1984) 35 Cal.3d 824, 835, overruled on other grounds as stated in *Blakeley, supra,* 23 Cal.4th at p. 89; *Garcia, supra,* 162 Cal.App.4th at p. 30.) A killing while one is unconscious of one's acts due to voluntary intoxication is also involuntary manslaughter. (*People v. Abilez* (2007) 41 Cal.4th 472, 516.) The Supreme Court has also left open the possibility that a defendant who kills in imperfect self-defense, but without an intent to kill and without conscious disregard for danger to human life, would be guilty of involuntary manslaughter. (*Blakeley,* at p. 91.)

B. Jury Instructions

As should be clear from our review of both the jury instructions and the governing law, the jury instructions by and large accurately informed the jury of the substantive legal standards applicable to Wilson's case. Wilson, however, alleges three specific instructional errors.

1. *Failure to Instruct on Involuntary Misdemeanor Manslaughter*

Wilson first argues that the trial court erred by not instructing the jury on a theory of misdemeanor manslaughter. In the trial court, Wilson requested an instruction based on a misdemeanor of unlawful possession of a firearm under "section 12021(a), possession of a loaded firearm," and the trial court refused the request. He argues not only that this refusal was error, but also that the trial court further should have sua sponte instructed on involuntary manslaughter based on the commission of the misdemeanors of carrying a loaded weapon in a public place (§ 12031) and brandishing a weapon (§ 417). We agree the trial court should have given an instruction based on brandishing. However, as we explain *post*, we do not find the error to be prejudicial.

It is settled that a trial court has a sua sponte duty to instruct on lesser included offenses whenever "the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142,

154 (*Breverman*).) The duty exists "even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.]" (*Ibid.*) Moreover, this includes a duty to instruct "on all *theories* of a lesser included offense which find substantial support in the evidence." (*Id.* at p. 162, italics added.) In *Breverman*, for example, the court found error where the defendant was charged with murder and the trial court instructed on an imperfect self-defense theory of voluntary manslaughter but not on a heat of passion theory of voluntary manslaughter, even though the latter theory was also supported by substantial evidence. (*Id.* at p. 148–149.)

Here, the trial court instructed on involuntary manslaughter as a lesser included offense of murder, but only on a theory that the killing "occurred in the commission of an act, ordinarily lawful, which involves a high degree of risk of death or great bodily harm, without due caution and circumspection," i.e., criminal negligence.[6] (§ 192, subd. (b).) Wilson argues that the trial court erred in failing to instruct on a theory of misdemeanor manslaughter.

a. The Misdemeanor of Unlawfully Possessing or Carrying a Loaded Firearm

In the trial court, the record reflects that Wilson requested a misdemeanor manslaughter instruction based on the misdemeanor of "Penal Code section 12021(a), possession of a loaded firearm." It is possible, as Wilson now suggests, that counsel simply misspoke or that his statement was mistranscribed, since the Penal Code section cited refers to possession of a firearm by a convicted felon, a felony. However, an initial discussion about the instruction was in chambers and not transcribed, and Wilson's statement on the record to preserve his objection reported, "I believe both the Court and

[6] Neither Wilson nor the People explain how this theory of involuntary manslaughter was supported by the evidence. (Cf. *Penny, supra,* 44 Cal.2d at pp. 863–865, 879 [discussing application of this theory of involuntary manslaughter to case where defendant caused death of client after applying face rejuvenation treatment].) Defense counsel's sole reference to this theory in closing argument was his explanation to the jury that "Now, involuntary manslaughter on the other hand is the unintentional killing of another accompanied by reckless conduct that is not excused." He did not argue that Wilson's conduct was unexcused recklessness.

the District Attorney felt that it did not rise to the level of probable cause and therefore is not appropriate." There is no further explanation provided, and as noted *ante*, the involuntary manslaughter instruction given was modified to delete that portion of the instruction based on the misdemeanor manslaughter rule—a killing "[d]uring the commission of an unlawful act, not amounting to a felony which is dangerous to human life under the circumstances of its commission."

Wilson acknowledges the statute cited by his trial counsel was inapplicable because it was undisputed he was not a convicted felon at the time of the incident, although it was undisputed that he was carrying a loaded firearm in a public place. He argues here that the court should have given the instruction based on section 12031, subdivision (a)(1)[7] which criminalizes the carrying of a loaded firearm in a public place even by those who are not convicted felons. Wilson does not contend here that he actually requested an instruction based on the latter statute, and so we consider only whether the trial court should have instructed sua sponte on this theory.

The People argue the instruction was properly refused in any event because the jury could not have found that Wilson's commission of the misdemeanor of possessing a loaded firearm was the proximate cause of Martin's death. Citing *Penny*, they argue that a misdemeanor manslaughter instruction is warranted only if there is evidence that the killing was the natural and probable result of the misdemeanor. In *Penny*, the defendant, an unlicensed cosmetologist, was convicted of involuntary manslaughter when a formula she applied to a client's face poisoned the client. (44 Cal.2d at pp. 864–865.) Finding it "extremely dubious" that the defendant's lack of a cosmetology license had any causal connection to the client's death, and could not thereby serve as the predicate misdemeanor for a manslaughter conviction, the court stated " '[w]e cannot ignore the element of causation in the unlawful act necessary to connect it with the offense. In our

[7] "A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory." (§ 12031, subd. (a)(1).)

ordinary phraseology we refer to the result of this element by saying it must be the probable consequence naturally flowing from the commission of the unlawful act.' " (*Id.* at p. 868.) The court further discussed proximate causation in the context of criminal negligence, explaining that criminal negligence is established if "the death was not the result of misadventure, but the natural and probable result of a reckless or culpably negligent act." (*Penny, supra,* 44 Cal.2d at p. 880.)[8] As the People observe, virtually every gun-related homicide offense involves possession of a loaded firearm at some level (although not always in a public place). Requiring an involuntary manslaughter instruction based only on commission of that misdemeanor without demonstration of a proximate relationship between the misdemeanor and the killing would swallow the rule.[9] Wilson directs us to no authority obviating the requirement of a proximate causal connection between the misdemeanor unlawful act and the homicide, and points to no

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[8] See also *People v. Nelson* (1960) 185 Cal. App. 2d 578, 580–583 (error to instruct on misdemeanor manslaughter based on "unlawful act" of illegally carrying a concealed firearm where gun discharged as defendant closed a car door and People conceded unlawful gun possession was not the proximate cause of the victim's death).

[9] We recognize that in the first degree felony murder context, the Supreme Court has explained that the statutory requirement that the felony be "committed in the perpetration of, or attempt to perpetrate," the felony does not require "proof of a strict causal relationship between the felony and the homicide." (*People v. Chavez* (1951) 37 Cal.2d 656, 669; see also 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 139, p. 754.) The statute does not require that the killing occur " 'while committing' or 'while engaged in' the felony, or that the killing be 'a part of' the felony, [but only] that the two acts be parts of one continuous transaction . . . . [Citation.]" (*Chavez,* at p. 670 [rejecting instruction that stated in part, "the killing must have . . . resulted as a natural and probable consequence [of the felony]"].) The rules of statutory first degree felony murder for enumerated felonies under section 189, however, differ in that the statute "obviat[es] the necessity for, rather than requiring, any technical inquiry concerning whether there has been a completion, abandonment, or desistence of the felony before the homicide was completed" and ". . . was adopted to make punishment of this class of crime more certain. It was not intended to relieve the wrongdoer from any probable consequences of his act by placing a limitation upon the res gestae which is unreasonable or unnatural." (*Id.* at pp. 669–670, italics omitted.) The first degree felony murder rule is a "creation of statute." (*Chun, supra,* 45 Cal.4th at p. 1182.) The same legislatively expressed policy considerations do not apply here.

evidence which would establish such a connection here. We conclude that a involuntary manslaughter instruction based on carrying a loaded weapon in a public place was not supported by the evidence.

b. Misdemeanor Brandishing of a Firearm

Although an instruction based on the misdemeanor of carrying a loaded weapon was not supported by the evidence, an instruction based on the misdemeanor of brandishing a firearm was.

"Every person who, except in self-defense, in the presence of any other person, draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a firearm in any fight or quarrel" is guilty of brandishing, a misdemeanor. (§ 417, subd. (a)(2).) "[T]he offense is complete on *exhibition* of the weapon in a rude, angry, or threatening manner." (*People v. McKinzie* (1986) 179 Cal.App.3d 789, 794.) "[N]either pointing the gun at the victim, nor firing it, . . . are elements of the crime." (*Ibid.*) However, pointing and firing the weapon are not necessarily inconsistent with a charge of brandishing. In *McKinzie*, the court held there was sufficient evidence to instruct the jury on involuntary manslaughter based on brandishing where the defendant aimed a loaded weapon at the victim and fired, but evidence supported a finding that the discharge was accidental. (*Id.* at pp. 794–795.)

Our Supreme Court has on at least three occasions held that a misdemeanor manslaughter conviction was supported or a misdemeanor manslaughter instruction was warranted where there was substantial evidence that a defendant did not intentionally fire the gun that caused the victim's death. In *People v. Southack*, the Supreme Court held the evidence supported a misdemeanor manslaughter conviction where the defendant, who had repeatedly told the victim to leave his home, carried a loaded weapon to the front door and fatally shot him. (*People v. Southack* (1952) 39 Cal.2d 578, 583–584.) The evidence showed the gun had a hair trigger and the defendant testified that he did not fire the gun, but the gun went off accidentally when someone bumped into him. (*Ibid.*) In *People v. Wilson* (1967) 66 Cal.2d 749, the defendant was charged with felony murder, with a burglary as the predicate felony, when he entered an apartment, killing his wife

and another man, and assaulting two others. The defendant testified that he entered the apartment with the intent to scare the inhabitants, but not to commit a felony, and the Court held that the jury should have been instructed that, if it believed the defendant, he was guilty of a misdemeanor pursuant to section 417 and the felony-murder rule was not applicable. It was therefore error not to give a brandishing instruction sua sponte as a predicate for the jury to possibly find the defendant guilty of misdemeanor manslaughter. (*Id*. at pp. 757–760.) In *People v. Lee*, a majority of the Court concluded the instruction should have been given where a highly intoxicated defendant argued and scuffled with his wife, retrieved a gun, pulled her into the hallway, scuffled with her again, and the gun discharged, killing her. (*People v. Lee* (1999) 20 Cal.4th 47, 53, 60–61 (plur. opn. of Baxter, J.); *id.* at p. 74 (dis. opn. of Mosk, J.).)

Although the People accurately characterize Wilson's testimony as "ambiguous," Wilson testified that he pulled out his gun and displayed it to Martin in order to induce him to withdraw. Assuming the jury rejected Wilson's claim that he acted in self-defense (a defense theory which would assume an intentional shooting), but nevertheless believed that the discharge was accidental, this testimony established the offense of brandishing. The People concede the point.

Wilson denied that he intended to kill Martin and he testified equivocally about whether he intentionally pulled the gun's trigger. He testified in part, "I moved back and . . . I pulled my hand up and upon doing that, the gun went off"; "I was holding the gun very, very tight . . . [and] the force if I was . . . pulling my hand up . . . I was squeezing it tight enough. I may have [pulled the trigger] . . . but I wasn't paying attention to what I was doing with the gun at the time"; ". . . I was shocked . . . that the gun went off." He denied that he "purposefully" pulled the trigger. Defense counsel argued that the evidence showed that Wilson did not intend to fire the gun.

On this evidence, the jury could have found that Wilson killed Martin while committing the unlawful act of brandishing the weapon, but without an intent to kill and without a conscious disregard for human life. Although the People persuasively argue

that the evidence also supported a finding of intentional discharge,[10] the test for instructional error is whether the evidence also would have supported a finding that Wilson did not intentionally discharge the gun. We conclude it did.

The People further argue the instruction was unsupported because the undisputed evidence showed that Wilson necessarily committed a felonious assault and not merely a misdemeanor brandishing, citing Wilson's testimony that "I did pull the trigger . . . ." The balance of his answer, however, was that "but I don't recall whether I squeezed the trigger on purpose or whether . . . the momentum made the trigger go off or I wasn't paying attention to the actual -- actual gun at that point." He was also asked by his counsel "Did you intend to pull the trigger?" and answered "Not that -- no. Not on -- not on purpose. I wasn't thinking about pulling the trigger. Whether -- whether it was a reaction of me pulling the trigger purposefully or not, I don't remember about that. I wasn't thinking about it."

The lesser instruction therefore should have been given. (See *People v. Lewis* (2001) 25 Cal.4th 610, 646 ["testimony of a single witness, including the defendant, can constitute substantial evidence requiring the court to instruct on its own initiative"].) In determining whether there is substantial evidence to support an instruction, the trial court is bound to take the defendant's testimony, at least for this limited purpose, as entirely true, regardless of whether it was of a character to inspire belief. (*People v. Wilson, supra,* 66 Cal.2d at p. 762.)

2. *Imperfect Self-Defense and Involuntary Manslaughter*

Wilson argues the trial court erred by instructing the jury, as to involuntary manslaughter, that "[t]here is no malice aforethought if the killing occurred in the actual

[10] The prosecution introduced evidence that the weapon used, which was recovered by police, had a very heavy measured trigger pull of 10.5 pounds—approximately double that of the average single action automatic weapon. Each juror was allowed to feel the trigger pressure required. As noted previously, Wilson's testimony was equivocal on the issue.

but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury." (CALJIC No. 8.45.)

The defense requested the instruction, and there is no indication that the defense sought any modifications to it.[11] When asked by the court to state for the record any objections he might have to the instructions, defense counsel made no mention of this instruction. In his closing argument, he specifically referenced the instruction when explaining to the jury the applicable law, that "[e]very person who unlawfully kills a human being without malice aforethought and without an intent to kill and without conscious disregard for human life is guilty of the crime of involuntary manslaughter. There is no malice aforethought if the killing occurred in the actual but unreasonable belief in the necessity to defend oneself or another person against imminent peril of life or great bodily injury."

" ' "The doctrine of invited error bars a defendant from challenging an instruction given by the trial court when the defendant has made a 'conscious and deliberate tactical choice' to 'request' the instruction." [Citations.]' " (*People v. Harris* (2008) 43 Cal.4th 1269, 1293.) Counsel's tactical purpose in requesting the instruction and arguing this issue is evident—to give the jury the option of returning a verdict of not just voluntary manslaughter, but involuntary manslaughter instead if they found imperfect self-defense. It is clear that he did not "act simply out of ignorance or mistake." (*People v. Maurer* (1995) 32 Cal.App.4th 1121, 1127.) He is therefore barred from making the argument here.

We also disagree with Wilson's contention that the instruction was erroneous because a killing in imperfect self-defense can never be involuntary manslaughter. The argument is based on a misreading of *Blakeley*, *supra*, 23 Cal.4th 82. As already noted, *Blakely* held that a defendant who, "with the intent to kill or with conscious disregard for life, unlawfully kills in unreasonable self-defense is guilty of voluntary manslaughter" rather than involuntary manslaughter. (*Blakeley*, at pp. 85, 91, italics omitted.) The court

[11] The prosecution did not request CALJIC No. 8.45.

went on to note, however, that it had "no quarrel" with the view expressed in Justice Mosk's dissent that a defendant who kills in unreasonable self-defense may still sometimes be guilty of involuntary manslaughter. (*Id.* at p. 91.) That dissent argued that, under the doctrine of imperfect self-defense, the actor could be not convicted of any crime "greater than voluntary manslaughter" but that an actual, but unreasonable, belief in imminent danger of death or great bodily injury could also demonstrate the absence of (as opposed to the negation of) the element of malice. (*Id.* at pp. 97–98, italics omitted.) The instruction given by the court here allowed the jury to consider that possibility.

3. *Involuntary as Lesser Included Offense of Voluntary Manslaughter*

Finally, Wilson argues the instructions mistakenly told the jury that involuntary manslaughter was a lesser included offense of voluntary manslaughter, and that they could not convict him of the lesser offense unless they first found him not guilty of voluntary manslaughter.

The court gave CALJIC No. 17.10, telling the jury that "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict him of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime. [¶] The crime of voluntary manslaughter is lesser to that of Murder charged in Count 1. [¶] The crime of involuntary manslaughter is lesser to that of voluntary manslaughter. [¶] Thus, you are to determine whether the defendant is guilty or not guilty of the crime charged in Count 1 or of any lesser crime. In doing so, you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on all charges and lesser crimes before reaching any final verdicts. However, the court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the defendant not guilty of the greater crime."[12]

[12] The colloquy between counsel and the court concerning the instructions indicates that defense counsel requested CALJIC No. 8.75 be given instead. That instruction would have appropriately told the jury that "Voluntary and involuntary manslaughter are lesser to that of murder in the second degree." Defense counsel said

Wilson contends that this instruction precluded the jury from concluding that a verdict of involuntary manslaughter could be based on the elements of that offense alone, and that it required the jury to make a "two-part finding" (not murder *and* not voluntary manslaughter) before considering involuntary manslaughter.

Wilson relies on *People v. Orr*, which holds that, while voluntary and involuntary manslaughter are both lesser included offenses of murder, involuntary manslaughter is not a lesser included offense of voluntary manslaughter. (*People v. Orr* (1994) 22 Cal.App.4th 780, 784–785 (*Orr*).) In *Orr*, the court was required to consider whether an earlier jury acquittal of involuntary manslaughter (and of murder) barred a retrial, on the basis of former jeopardy, on the offense of voluntary manslaughter, on which the jury had been unable to reach a verdict. (*Id.* at p. 782.) Holding that involuntary manslaughter was not a lesser included offense of voluntary manslaughter (although both were lesser offenses of murder), the court summarized the differences as follows: "[I]n order to convict a person of voluntary manslaughter, the jury must find that the killing was intended and was unlawful in that it was neither justifiable, that is, did not constitute lawful defense of self, others, or property, prevention of a felony, or preservation of the peace (§ 197 . . .); nor excusable, that is, the killing did not result from a lawful act done by lawful means with ordinary caution and a lawful intent, and did not result from accident and misfortune under very specific circumstances, including that no dangerous weapon was used (§ 195 . . .). In order to convict a person of involuntary manslaughter, the jury must find that the killing was unlawful in that it occurred in the commission of an ordinarily lawful act which inherently involved a high degree of risk of death or great bodily harm and was accomplished in a criminally negligent manner. The definition of unlawful as an element of involuntary manslaughter differs significantly from that of voluntary manslaughter and requires the trier of fact to make substantially different findings. Voluntary manslaughter can be committed without committing involuntary

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"I'll stand by my request for the other one. I don't have strong feelings about it. I'll submit it."

manslaughter, and thus the latter is not a lesser included offense of voluntary manslaughter. [¶] While both voluntary and involuntary manslaughter are lesser included offenses of murder, it does not follow that involuntary manslaughter is a lesser included offense of voluntary manslaughter. They are merely siblings who have a common parent." (*Id.* at pp. 784–785, fns. & italics omitted).)

In reaching this conclusion, *Orr* applies the statutory elements test for identifying lesser included offenses, which asks whether all the elements of the lesser offense are included in the elements of the greater charged offense, thus establishing that the charged offense cannot be committed without also committing the lesser offense. (*Orr, supra,* 22 Cal.App.4th at p. 783, citing *People v. Greer* (1947) 30 Cal.2d 589, 596, overruled on other grounds by *People v. Fields* (1996) 13 Cal.4th 289, 308 & fn. 6.) *Orr* compares these elements, however, based on the text of CALJIC jury instructions. (*Id.* at pp. 783–784.) We question this methodology. Notably, the newer CALCRIM instructions on voluntary and involuntary manslaughter differ substantially from the CALJIC instructions and do not include an unlawful killing element for the crimes, much less different definitions for that element as to each crime. (See CALCRIM Nos. 571, 572, 580, 581.) The manslaughter statute itself also does not define the elements of the crime in the manner of the CALJIC instructions. Section 192 provides that "[m]anslaughter is the unlawful killing of a human being without malice," and then provides, "It is of three kinds: [¶] (a) Voluntary--upon a sudden quarrel or heat of passion. [¶] (b) Involuntary--in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. . . ." Case law establishes that the "upon a sudden quarrel or heat of passion" phrase in the statute is not an element of the voluntary manslaughter. (See, e.g., *Rios, supra,* 23 Cal.4th at p. 469 [heat of passion and imperfect self-defense are not elements of voluntary manslaughter].) Yet the definition of the "unlawful killing" element in the CALJIC instruction for involuntary manslaughter, on which *Orr* relies, derives from a parallel phrase in the statute. The Supreme Court, in holding that section 192 does not exclusively describe the circumstances in which these crimes may

be committed, has explained that the " '*basic definition* set forth at the outset of Penal Code section 192 *is of controlling significance*—"Manslaughter is the unlawful killing of a human being, without malice." ' [Citation.]" (*People v. Burroughs, supra,* 35 Cal.3d at p. 836, italics added.)

However, we need not decide whether involuntary manslaughter is a lesser included offense to voluntary manslaughter, or as *Orr* suggests "merely siblings who have a common parent." Even if we assume that the result in *Orr* was correct, we conclude *post* that any error was not prejudicial.

C. Prejudice

The parties disagree about the standard of review for the instructional errors Wilson alleges.

1. *Standard of Reversible Error*

Generally, prejudice from a failure to sua sponte instruct on a lesser included offense is determined by the *People v. Watson* standard: reversal is warranted only if it appears reasonably probable the defendant would have achieved a more favorable result had the error not occurred. (*Breverman, supra,* 19 Cal.4th at p. 149; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Ambiguities in jury instructions generally warrant reversal only if there is a reasonable likelihood the jury misunderstood or misapplied the instructions. (*People v. Avena* (1996) 13 Cal.4th 394, 417.) Errors of state law alone are subject to the *Watson* standard of reversible error. (See *Watson*, at p. 836.)

Wilson argues that the Supreme Court has implicitly abrogated *Breverman*'s holding that a trial court's failure to instruct sua sponte on lesser included offenses is reviewed for harmless error under the *Watson* standard. He cites *People v. Elliot*, an automatic death penalty appeal, in which the Court declined to rule on the merits of the defendant's argument that the court failed to adequately instruct on the lesser included offense of second degree murder "because we conclude any assumed instructional error on this score was harmless beyond a reasonable doubt. (See *Chapman v. California* [(1967) 386 U.S. 18,] 24.)" (*People v. Elliot* (2005) 37 Cal.4th 453, 457, 475.) The opinion does not disclose whether the defendant affirmatively requested the omitted

instructions, which would distinguish *Breverman, supra,* 19 Cal.4th 142 (where the defendant did not request the instruction). Nor does *Elliot* even mention *Breverman*. (See *People v. Ochoa* (1993) 6 Cal.4th 1199, 1211 ["cases are not authority for propositions not considered"].) Moreover, *People v. Prince*, an automatic death penalty appeal decided after *Elliot*, cites with approval several cases applying the *Breverman*/*Watson* standard. The Court then acknowledges the conflict with *Elliot* by citing the case with a "but see" signal and the parenthetical, "characterizing erroneous failure to instruct on a lesser included offense as a denial of due process of law to be evaluated on appeal under the standard set forth in *Chapman*[, *supra,*] 386 U.S. [at p.] 24." (*People v. Prince* (2007) 40 Cal.4th 1179, 1267, parallel citations omitted.) *Prince* also applies the *Breverman*/*Watson* standard and specifically considers and rejects an argument that the failure to instruct amounted to federal constitutional error. (*Id.* at pp. 1268–1269.) Even more recently, in *People v. Moye*, the Supreme Court again cited *Breverman* with approval and also applied the *Watson* standard of harmless error to review of failure to instruct on lesser homicide offenses. (*People v. Moye* (2009) 47 Cal.4th 537, 555–558.)

Wilson argues the instructional errors he identified cumulatively amount to structural error requiring per se reversal because they precluded the jury from giving meaningful consideration of the defense theory that he was guilty only of involuntary manslaughter. He relies on *Conde v. Henry*, where the Ninth Circuit Court of Appeals found structural error because "the trial court improperly precluded Conde's attorney from making closing argument explaining the defendant's theory of the case, it refused to instruct the jury on the defendant's theory, and, over the defendant's objection, it gave jury instructions that did not require that the jury find every element of the offense. . . . The very framework within which the trial proceeded on the kidnapping charge prevented the defendant from presenting his theory of the defense and prevented the jury from determining whether all of the elements of [the offense] had been proved beyond a reasonable doubt." (*Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 741 (*Conde*).) *Conde* is readily distinguishable. Wilson has not demonstrated that the trial court interfered with

his ability to present his chosen defense to the charges. The only trial court ruling he cites is the court's rejection of a misdemeanor manslaughter instruction submitted on an articulated theory inapplicable to the facts of this case. That instruction was properly refused. Wilson does not contend the court restricted the scope of his closing argument, precluding him from presenting a defense, or that the court misinstructed on the elements of the charged crime, reducing the prosecutor's burden of proof. Therefore, the *Conde* rationale does not apply.

For similar reasons, we reject Wilson's argument that the instructional errors violated his federal constitutional rights, requiring prejudice to be determined under the *Chapman* standard, and requiring us to reverse unless we conclude beyond a reasonable doubt that the verdict would have been the same without the error. (*Chapman, supra,* 386 U.S. 18.) In the cases cited by Wilson, courts found federal constitutional error where the trial courts denied *affirmative* defense requests for instructions or precluded evidence in support of a defense theory. (See *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098 [denial of instruction on defense theory violated federal due process]; *Barker v. Yukins* (6th Cir. 1999) 199 F.3d 867, 875 [denial of instruction on defense theory violated 6th Amendment]; *Crane v. Kentucky* (1986) 476 U.S. 683, 687 [exclusion of defense evidence violated 6th Amendment]; *California v. Trombetta* (1984) 467 U.S. 479, 485 [federal due process clause requires "that criminal defendants be afforded a meaningful opportunity to present a complete defense"]; *Faretta v. California* (1975) 422 U.S. 806, 819 [6th Amendment grants to defendant personally the right to make a defense]; *Beardslee v. Woodford* (9th Cir. 2003) 358 F.3d 560, 577–578 [holding that "[f]ailure to instruct on the defense theory of the case is reversible [federal] error if the theory is legally sound and evidence in the case makes it applicable," but finding error harmless under habeas standard in part because defendant had not objected to instruction]; *Tyson v. Trigg* (7th Cir. 1995) 50 F.3d 436, 447–448 [holding defendant has constitutional right to instruction in support of defense theory supported by evidence, but finding insufficient evidence for instruction]; cf. *People v. Woodward* (2004) 116 Cal.App.4th 821, 842 [no federal error where defendant "received the statutory

affirmative defense instruction," even though instruction included some inapplicable factors].) As already stated, the trial court here did not improperly deny any *affirmative* requests by Wilson for jury instructions or other procedural orders, thereby precluding him from presenting his chosen defense or defenses to the jury. Instead, the trial court failed to sua sponte instruct on a theory supporting a lesser included offense and gave one instruction arguably incorrectly characterizing a lesser offense which the jury never reached. Such errors are subject to the harmless error analysis set forth in *Watson, supra*, 46 Cal.2d at p. 836, and *People v. Avena, supra*, 13 Cal.4th at p. 417.

2. *Application of the Review Standard*

We conclude there is no reasonable probability that a different jury verdict would have been rendered had the court instructed on a theory of misdemeanor manslaughter. (See *Breverman, supra,* 19 Cal.4th at p. 149.) A determination that a duty arose to give instructions on a lesser included offense, and that the omission of such instructions in whole or in part was error, does not resolve the question whether the error was prejudicial. (*People v. Moye, supra*, 47 Cal.4th at p. 556.) In determining whether there is a duty to instruct on a lesser included offense we focus on what a reasonable jury *could do.* On appellate review under *Watson*, we instead focus on "what such a jury is *likely to have done* in the absence of the error." (*Ibid.*, italics added.)

Wilson's counsel argued to the jury that Wilson acted lawfully in reasonable self-defense when he drew and pointed a gun at Martin, and that he did not intentionally pull the trigger—that it was a "terrible accident." He argued that Wilson was not guilty of murder or voluntary manslaughter, and that he was not even guilty of involuntary manslaughter "unless he was acting unlawfully when that gun discharged and was not acting in self-defense.

To reach an involuntary manslaughter verdict based on commission of an "unlawful act, not amounting to a felony," the jury would first have had to conclude that Wilson acted without malice, neither intending to kill nor acting in conscious disregard for danger to human life. The jury's questions during deliberations disclose that it was focused on the question of Wilson's state of mind at the time of the killing. The jury

asked for "clarification of the term 'intentional act' " in the definition of implied malice (conscious disregard for danger to human life), and when asked to make their question more specific asked, "Is pulling out a gun and firing it an intentional act?" The court responded, "Either of those actions, if you find them proved, could qualify as an 'intentional act.' " The jury then asked for a readback of "testimony of the events right before the gun shot was fired."

By returning a verdict of second degree murder, the jury not only found that the killing was committed *with* malice, but also obviously rejected the theories that malice was negated by either heat of passion or by any subjective good faith belief in the need for self-defense—precluding either voluntary or involuntary manslaughter. Further, the jury unanimously found true the allegations that Wilson intentionally discharged the firearm, thereby rejecting Wilson's testimony about how the weapon was fired, and precluding any basis to find the predicate misdemeanor of simply brandishing the gun requisite to his theory of involuntary manslaughter. The verdict reflects a determination by the jury that Wilson pointed a loaded firearm at the victim without justification or excuse and intentionally pulled the trigger, actions constituting at least implied malice, even in the absence of an intent to kill.

Wilson argues the jury may have felt pressured into convicting him of murder in the absence of an involuntary misdemeanor manslaughter instruction, because, having apparently rejected his claim of self-defense (perfect or imperfect), the jury was faced with an all-or-nothing choice of convicting Wilson of murder or acquitting him. Wilson correctly notes that the sua sponte duty to instruct on lesser included offenses is designed to avoid just this kind of all-or-nothing choice. The rule "prevents the 'strategy, ignorance, or mistakes' of either party from presenting the jury with an 'unwarranted all-or-nothing choice,' [and] encourages a 'verdict . . . no harsher or more lenient than the evidence merits' [citation], and thus protects the jury's 'truth-ascertainment function' [citation]. . . . [¶] . . . [T]he rule seeks the most accurate possible judgment by 'ensur[ing] that the jury will consider the full range of possible verdicts' included in the charge,

regardless of the parties' wishes or tactics. [Citation.]" (*Breverman, supra,* 19 Cal.4th at p. 155, first ellipsis in original, italics omitted.)

In the first instance, these were not the only choices for the jury, since a heat of passion theory for voluntary manslaughter was also presented and argued. Had the jury wished to exhibit lenity it had ample opportunities to do so. Further, the jury finding that Wilson intentionally discharged the weapon could not have been the result of pressure posed by an all-or-nothing choice because the jury had the option of finding Wilson guilty of second degree murder without also finding the allegation—inconsistent with the absence of malice—to be true. There was no reasonable probability the verdict would have been different had the jury been instructed on a misdemeanor manslaughter theory.

For similar reasons, we find that any alleged error in instructing that involuntary manslaughter was a lesser included offense of voluntary manslaughter could not have affected the verdict. (*Watson, supra*, 46 Cal.2d at p. 836.) Wilson argues that the error required the jury to go through a two-step process to reach an involuntary manslaughter verdict (not guilty of murder, then not guilty of voluntary manslaughter) rather than the one-step process required by the law (not guilty of murder only). However, he does not explain why this made any material difference. To reach either voluntary or involuntary manslaughter, the jurors would have had to find that the People had failed to prove beyond a reasonable doubt that Wilson acted with an intent to kill or with conscious disregard for danger to human life. They did not. The jury rejected any theory of manslaughter, either voluntary[13] or involuntary, and consequently did not even need to reach what Wilson posits as the "first step" to consider any lesser verdict.

Any errors in the involuntary manslaughter instructions were harmless.

[13] Wilson alleges no instructional errors on voluntary manslaughter.

III. DISPOSITION

The judgment is affirmed.

_____
Bruiniers, J.

We concur:

_____
Simons, Acting P. J.

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Needham, J.